“Principles of European Trust Law” and “Draft Directive on Protective Funds”  
(Interview with Professor Kenneth Reid)

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[Introduction]

This is a transcript of an interview with Professor Kenneth Reid on the issues related to “Principles of European Trust law and Draft Directive on ‘Protective Funds’” – , held in August 2010 in Professor Reid’s office at the University of Edinburgh. Professor Reid is an authority on property law and feudal law in Scotland and he is also one of key persons in the movement of integrating trust law in Europe.

(Watanabe)

Watanabe: Professor Reid, I’m very happy to have a chance to meet you again after about two years. First I would like to ask you questions about the protected fund project. And then ask you some questions on Scottish trust and the essence of the trust.

Reid: Okay.

Watanabe: I’d like to ask you who designed the idea of producing a draft EU Directive on Protected Funds.

Reid: As far as I know, the answer is that this was a Dutch idea, from the University of Nijmegen. I became involved quite early, but by that time they had already made up their minds. They had already decided that they wanted to try to produce a directive.

I think the more interesting question is why they then confined it to commercial properties. I think the answer to that is that in much of Europe the attraction of the trust is seen as being the commercial use, and not anything else. What they particularly didn’t want was a trust in succession (inheritance) cases or in family cases. What they were looking for was to have a trust that could be used as a business vehicle. I think that’s the attraction.

That in itself is quite interesting, because in the Common Law world the business use of trusts, although obviously very important, is not the core of the trust. The trust didn’t develop originally as a business vehicle at all. Its origins are quite different.

But I think for this project, it was the business angle that they were interested in.
And, of course, that fits in with the European Union, because the European Union does not have power to legislate in ordinary matters of private law. There has to be some trading, or other, reason to bring it within the powers of the European Union. So a commercial function makes it much easier to produce a directive.

Watanabe: I suppose Dutch scholars were especially active in this project.

Reid: That’s right. If you go back to earlier projects, the Principles of European Law project was also a Dutch project. I think the Dutch are particularly interested in the trust, because they do so much work in English law, using English-law contracts. The big Dutch law firms are very much involved in big banking and other commercial negotiations. And many of those contracts are written under English law.

So the idea of the trust is quite familiar to a lot of leading Dutch commercial lawyers. And I think they feel that the trust is potentially very attractive. They would like to have it in their country.

So as well as there being a European angle to this, there is also quite a strong Dutch angle. What some Dutch scholars are trying to do is sell the idea of the trust in the Netherlands so that people will be persuaded that the trust is a good idea.

But so far this has not happened. There is no trust in Dutch law. There is in French law. As you pointed out in your article, there is at least a sort of trust: the fiducie, as under Luxembourg law, etc. The Dutch haven’t done this. The Dutch still don’t have a trust.

Watanabe: In this book I many of the authors are Dutch academics: for example, Professor Kortmann.

Reid: Kortmann is Dutch. Faber is Dutch. And Biemans is Dutch. All three are Dutch. So there are three Dutch people, myself, a Scotsman, and, of course, David Hayton, who is English.

Watanabe: Yes, I understand he has been a professor in England. And now a judge in the Caribbean Court.

Reid: He is now a judge in the Caribbean Court of Appeal. That’s right. But, of course, he is a great expert on trusts. And he is one of the great trust lawyers.

So we have actually got a good team, because David Hayton is such a distinguished and knowledgeable trust lawyer. He knows everything about trusts. We had a lot of very useful meetings, actually. They were stimulating and enjoyable.

Watanabe: Who designed the earlier project on Principles of European Trust Law?

Reid: That I can’t tell you, because I came into the project very late. I only attended the final meeting. And I don’t know where it started from, really. I know that in the University of Nijmegen, in the Netherlands which is where it was based, they did have as a visiting professor Donovan Waters.

He had been working there, I think teaching trusts. He was involved in it. Maybe it was his idea. I actually don’t know.

In a way, it was a very curious enterprise, because the name Principles of European Trust Law is a strange name, because there is no such thing as European trust law. So they were setting out principles of something that does not exist, because most European countries don’t have trust law.

This was being done at the same time as a different group, the so-called Lando Commission, was producing its Principles of European Contract Law. But, of course, that made perfect sense, because every country has contract law. So you can try to produce some sort of unified principles.

But Principles of European Trust Law is a very odd idea, because most European countries don’t have any trust law.

But I think if you read the introduction to the Principles, you will see that one of the ideas was to
make trust law accessible to civil-law countries. And this goes back to the period, which I think is now changing, but it was 15 year ago, when civil-law countries thought that it would be impossible to have the trust.

There was this view in Europe, at least, that the trust was purely an English Common Law/Equity idea and that it would be impossible to have it. And I think one of the ideas behind the Principles was to show that that was not true, that you can actually produce principles that work perfectly well in a civil-law system.

And I think the Principles have been quite influential. I think they have encouraged other things, including Book X of the Draft Common Frame of Reference. I think people have been influenced by it, at least the idea.

So, although it's now a bit out of date, I think at the time it was produced it was quite important.

Watanabe: It was advocated by David Hayton, wasn’t it?

Reid: Yes, written by David Hayton.

Watanabe: Has the project substantially been led by Professor David Hayton?

Reid: Do you mean, “Did he write the actual Principles?”

Watanabe: Yes.

Reid: The actual writing of it was done first by David and then by me, because we were the two English-language members of the team. And there was Peter Birks, as well, from Oxford.

But, yes, David did a lot of the initial drafting. And then I changed it quite a bit. So we did it between us, I guess. It was done by a committee, but I think a lot of the actual . . .

Watanabe: What type of changes did you make?

Reid: I made it more Scottish! When the group was set up, there were two people from the United Kingdom. One was David Hayton, and the other was Peter Birks. Peter Birks said to them, “Look, you should have somebody from Scotland, because the Scottish trust is different. And it might be helpful.” So he suggested they ask me. And they did ask me. But I only attended the last meeting. By then the Principles already existed, and the text was well advanced.

It’s difficult now to remember, but I think probably the full idea of the patrimony theory, as used in the Principles, came from me. George Gretton and I had already worked on this idea in Scotland, and it seemed to both of us a good way of explaining the trust. So either I introduced it into the Principles or made it more prominent than it had previously been.

And you showed in your article that the Dutch introduction to the Principles mentions that they found Scottish law useful. And they were completely surprised, because they didn’t know anything about it. It was Peter Birks’ idea to have somebody from Scotland. And it was only when I came along and produced my own stuff that they realized how useful the example of Scotland might be to civil-law countries trying to have a trust.

So to some extent it was an accident that I became involved and Scotland became involved. But it is one of the areas where Scottish law does have something to teach, because the Scottish experience with trusts is very different from the English experience.

Watanabe: I remember that Professor Verhagen also stressed on that point.

Reid: Yes, that’s right.

Watanabe: As you said, this project of the Principles was led by David Hayton, you, and Dutch scholars.
Reid: Yes.

Watanabe: On the other hand, when I read the commentary in each jurisdiction, I felt that some of the commentators have not been actively involved in making the Principles, for example, Germany and Spain.

Reid: That’s probably right. But, of course, for these countries it’s quite difficult, because they don’t have the trust, although Germany does have something that has some resemblance to the trust, but not the trust itself. Germany has a so-called fiduziarische Treuhand, which is has some resemblance to a trust. But it's quite far from being a full trust.

And my impression has always been that in Germany a trust in the full sense, with bankruptcy protection for revolving assets, would not be acceptable.

One of the problems that systems of civil law have with trusts, at least in Europe, is not just the characteristic separation of ownership and entitlement, but also publicity [transparency], because the trust is not publicized. And I think that's very controversial in a lot of European countries, the idea that somebody should get protection against bankruptcy, that certain creditors should be given preference, while that preference is not put in a register somewhere. It's not publicized. And I think that that is a serious difficulty for Germany and for a number of other countries.

And yet, of course, that's the whole essence of a trust. It's that it's private. It's like a contract. Nobody needs know about it. There is no register of trusts.

Watanabe: In the case of the new protected fund, to my understanding, publicity is not needed.

Reid: That's correct. But that was quite controversial. We had a lot of discussions about this. And some countries were not happy about not having publicity.

Watanabe: For example, Germany?

Reid: I don't specifically remember Germany on that occasion. I probably shouldn't say, because it was quite a long time ago, and I'd probably get the wrong countries. But I do remember a lot of discussion about it. For some countries, that lack of publicity is a real difficulty.

Of course, it would be possible to have a system where trusts had to be registered. That would be a perfectly reasonable rule. But it would make trusts less useful and less used if you had to have publicity.

Watanabe: Regarding the protected funds project, are there any other points on which there may be many objections other than publicity?

Reid: There were various difficulties. One difficulty was constitution, how you create a trust, because in quite a number of European countries, particularly the ones that are based on French law, in order to have a transfer there has to be a cause. There has to be a cause of transfer. Otherwise the transfer is not valid.

And one of the worries was how you set up a trust, what the cause of the trust was. And this is something I don’t fully understand, because we don’t have this doctrine in Scotland. But there was some concern about how that would fit in with the rules of transfer in those countries. So that was another issue, I think.

But what is interesting is that on the whole there was not very much disagreement. There was some disagreement about some of the details. But the idea of trusts or of a protected fund wasn’t in itself all that controversial, the idea that you have a separate fund that is put to one side and can’t be attached by other creditors.

I think that fundamental idea was not in itself controversial. And many countries do use this in one way or another, or sometimes in narrow ways. For example, in many countries there is a rule that if a
notary public is holding money for a client, that money is in an earmarked, protected fund, so that if the
notary public becomes insolvent the client's money is safe.

And that is a simple example of what a protected fund is. It's a fund that can't be attached by the
general creditors of the person holding the money.

**Watanabe:** In Chinese trusts, a trust can be set up without any transfer of the assets. What do you think
about that? Is it a trust or not?

**Reid:** In other words, the assets remain with the settlor. Is that right?

**Watanabe:** Yes. Remain with the settlor.

**Reid:** Yes. It is possible.

**Watanabe:** So what does the trustee do? The trustee simply administers the funds, although the funds
don't belong to the trustee. They belong to somebody else.

**Reid:** I don't know whether you have come across this, but that has some resemblance to an institution
the Dutch have called the bewind, which they also have in South Africa. South Africa took this from Ro-
man Dutch Law.

**Watanabe:** Did you say Roman Dutch Law?.

**Reid:** Roman Dutch Law, exactly. In a bewind, it's like that. In a bewind there is no transfer to the trustee.
Instead the assets are held by the beneficiary. The trustee simply administers the property, without actu-
ally ever becoming the owner.

If you have that system, one thing you can't so easily have is bankruptcy protection.

**Watanabe:** But if the assets are segregated from the settlor's own assets, . . .

**Reid:** All right. If the assets are segregated, then bankruptcy protection is possible.

Is that a trust? I have no idea. It might be a trust under the Hague Convention. One would have to
look at the definition there, because that has a very broad definition of a trust.

It's certainly not a trust in the ordinary sense. If you ask an English lawyer if that's a trust, I think
the answer you would get is “Definitely not.”

**Watanabe:** But suppose in the declaration of trust there is no transfer of assets substantially. But it's a
kind of trust.

**Reid:** Right. Okay. So you are setting up a trust where at the time you set it up there are no assets at all.
I think that's something that could be recognized as a trust, yes. If you think of a trust as a box with things
inside it, then what you are doing is making the box, but you just don't have the things to put inside it yet.
So it's a box without anything inside it, if you like.

I remember that we discussed a bit when we were looking at protected funds as to whether you
could do it or not. I think the view was that you probably could, that it would be alright. You would set up
the structure of a trust, even though there weren't actually any assets yet. So it would be a trust for future
assets to come into.

I think that's probably alright.

**Watanabe:** If the essence of the trust is the segregation, such a trust can be admitted.

**Reid:** I think that's right. When you say the essence of a trust is segregation, I think that's not the only
thing you need to have for something to be a trust. I think you can't have a trust without segregation. So
you need segregation. But I think a trust is more than simply having segregated funds.

What else is essential to trusts? One of the other essential things is that you have the trust prop-
The whole fiduciary idea is central to trusts, as well.

Watanabe: In protective funds it is the administrator, I think.

Reid: We call it administrator, that’s right. You will have noticed that the protected fund draft is very careful to avoid using the language of trusts. So it doesn’t use the word “trustee,” and so on. And that is done deliberately. If the language of trusts had been used, people would have misunderstood it, I think, and thought this was just like an English trust, which it isn’t. It’s not like an English trust. It has some resemblances to it, but it’s a different thing.

So administrator is the term used, that’s right.

Watanabe: As you know, most civil lawyers say we cannot accept the “trust.” But to my understanding, it is possible to introduce the effects of trusts almost fully in civil-law jurisdictions, without using the notion of a double property right.

Reid: I think that is true. Obviously, you don’t need equity. That is plain. Equity, in a way, is just sort of a historical explanation for the trust. It explains why there is a trust. But it is not central to explaining how a trust works, at any rate outside the common law world.

And it’s obvious that you can have a trust without equity. That’s absolutely true.

But any system that wants to have the trust could have it, by appropriate adjustments of its law. I don’t think there is any great mystery about the trust.

And I think the mistake that people have tended to make is that when they think about the trust, they think only about the English trust. And then they say, “Well, we couldn’t possibly have that.” And I think that’s probably true. But you could have most of the effects of a trust without actually following the English model.

And that’s why I think the Principles of European Trust Law were quite important, because they showed that you could have a civil-law trust, and the same is true of the DCFR. The DCFR is actually quite interesting, because the DCFR is to some extent a sort of draft civil code for Europe.

And it’s interesting that the people who were involved in it decided that they wanted a book on trusts. There are 10 books in the DCFR, and one of them is on trusts. So for legal scholars thinking about what a future European civil law should look like, they thought the trust ought to be part of it. And I think that’s quite interesting.

It suggests that the attitude toward the trust has changed. I think if the DCFR had been done 20 years ago nobody would have put the trust in. So it’s a sign that the trust, which used to be regarded as just very odd, and very English, is now regarded actually as a central part of European private law.

Watanabe: I think the word “property” has been used in some different way between common law jurisdictions and civil law jurisdictions. What is meant by “property” in the U.K. and in civil-law countries is very different.

Reid: I think that’s right. I noticed that you said that in your article\(^2\), as a point that you attributed to Paul Matthews, where Paul said that it’s all very well to say that in English law the beneficiary is the owner, but that is not ownership in the civil-law sense. That’s ownership in the common-law sense.

And I think that’s a point well made. I think that that is absolutely right, that ownership doesn’t mean the same thing under civil law and common law. And some English lawyers will tell you that they
don’t have the concept of ownership, anyway, that ownership is not really an English-law concept at all.

So it is partly a question of labels. I think that’s right. If you look at the position of the beneficiary in England and the position of the beneficiary in, for example, Scotland or South Africa, you might say, “Well, the label is different, because in England one says that the beneficiary has ownership, and in Scotland or South Africa you say the beneficiary doesn’t have ownership. The beneficiary has a personal right.”

So the label is different. But actually, if you take the labels away, there isn’t so much difference between the actual position of the beneficiaries.

There is some difference. I think where the difference arises is where the trustee sells the assets, in breach of trust. If the trustee sells the assets in breach of trust, in English law the beneficiary has a proprietary remedy, because the beneficiary is still the beneficial owner. So he can go against a third party. But in Scotland that would not be possible. In Scotland the remedy is a personal remedy. There is no proprietary aspect to it.

Paul Matthews’ point is correct, but it’s not the whole story. It’s not just a matter of labels. There is substance in the difference, too. And the English trust gives beneficiaries more rights that the Scottish trust does, because their rights are proprietary and therefore can’t be affected by bankruptcy, not just bankruptcy of the trustee but bankruptcy of anyone to whom the trustee transfers the property unlawfully. So it’s a bit more than just a label.

But, yes, that’s right. Of course, the concepts of property are different.

**Watanabe:** But I think in Scotland, and in some other legal systems, the position would be regulated by unjustified enrichment or something.

**Reid:** That’s right. In Scotland and in other civil-law countries, no doubt in Japan as well, one would deal with a lot of these problems not by trusts but by, for example, unjustified enrichment or fraud, delict, or other parts of the law of obligations.

However, in English law you might deal with it by trusts. I think that’s right.

I think that’s historically one reason that English law has been very slow to recognize unjustified enrichment. It’s a relatively modern discovery in English law, the whole idea of unjustified enrichment. And one reason for that is that they have managed to avoid it by simply using the trust instead.

So it’s interesting. I think that a civil-law system, even if it adopted the trust, would not use the trust as fully as English law does. In English law it is so much part of the legal landscape, whereas civil-law trusts would be a tamer, more limited device, I think.

**Watanabe:** I suppose the fundamental difference between common-law trusts and civil-law trusts lies in the flexibility of the notion of the trust. For example, the attitude towards constructive trusts.

**Reid:** I think there are two things there. Trusts are obviously flexible. You are absolutely right. They can be used for all sorts of purposes. A trust is protean. It’s like a contract. You can use a contract for all sorts of purposes. So you can use a trust, as well.

But I’m not sure that is in itself a common law/civil law difference, because the civil-law systems that have the trust, such as Scotland, will use the trust for all sorts of situations as well. I don’t think that the use of the trust in Scotland, for example, is much different from that in England. I think it is used in the same way and in the same situations.

Where there is a difference is constructive trusts. I think that’s a major difference. But some people will say that constructive trusts are not really trusts anyway, or not trusts in the ordinary sense. It’s a very
curious doctrine.

And, of course, in English law, as you know, the constructive trust is highly significant and is used a great deal. In Scotland it’s used a bit, and it’s very controversial.

In South Africa it is not used at all. They don’t have it in South Africa.

Insofar as civil-law systems take on the trust, I would be surprised if many of them take on the constructive trust, because the constructive trust, if you take it seriously, is difficult to run at the same time as traditional obligations-based remedies, such as unjustified enrichment, because the constructive trust amounts to giving a preference in bankruptcy to certain categories of creditors. And that is very alien to a lot of European systems, which would adopt the attitude of paritas creditorum (parity of creditors). And there is no reason why one creditor should be preferred over others.

Watanabe: It’s a big problem.

Reid: I think it is a big problem. And certainly in English law it has its critics, the way the constructive trust has been used.

As I say, in Scotland it’s very controversial. Nobody knows, really, what the law of constructive trusts is in Scotland. It would be difficult to give an accurate statement of it.

Opinions of the courts vary from judges who think it’s a terrible thing to other judges who think we should just follow English law. So it’s quite controversial. But South Africa doesn’t have it.

Watanabe: Also in Japan, which has trust law by legislation, the constructive trust has been rarely admitted.

Reid: But it is sometimes admitted, isn’t it? Do you sometimes have it?

Watanabe: There have been only a few cases.

Reid: Okay, right.

Watanabe: It’s very rare.

Reid: Yes. I think that’s right. I think when people talk about introducing trusts there are really two questions. One is “Do you have ordinary trusts?” And the second question, which is quite a different question, is whether you have constructive trusts. And I think that most systems could take the ordinary trust without too much difficulty. But I think taking the constructive trust is a very different matter. And I think you would really have to rethink your law of obligations, because it will change your law, for example, on unjustified enrichment if you admit constructive trusts, and law of bankruptcy.

Watanabe: By the way, as you know, there are some ways of introducing trusts into civil-law jurisdictions. One is the French way: to introduce trusts by legislation. The second is the Italian way: substantially introduce trusts by way of interpretation of the Hague Trust Convention, Article VI: “A trust shall be governed by the law chosen by the settlor.”

Compared with other approaches, what type of advantage do you think the protected fund has?

Reid: These are quite big questions. As you know, the Italian version is pretty controversial. A lot of people think you can’t use the Hague Convention in this way.

And I think outside Italy, no other country has done this. For example, the Netherlands is a signatory to the Hague Convention, but nobody in the Netherlands has ever tried to argue, “You could have an internal trust,” a trust that operates in effect under Dutch law but written under the law of England, or something like that, using the Hague Convention.

So I think the Italian approach is controversial. And it’s obviously not an ideal way to do a trust, in
any case.

The protected fund has two attractions. One is that the conceptual framework is set out very clearly and in a way that I don’t think is difficult for most civil-law countries in Europe. I think any private lawyer reading it, even a private lawyer not familiar with trusts, wouldn’t find it difficult to understand. So I think it could be introduced without any serious damage to those countries.

Second, it has the advantage of being very limited in scope. You could only use it in a commercial context. So it’s not going to be used, for example, to upset family law or to upset inheritance law, or anything like that.

So if a country wishes to experiment with trusts, then the protected fund is quite a good way of doing it.

There is also a third reason, which actually is quite important in a European Union context. That is that if there were to be a directive on protected funds, it would mean full mutual recognition, because this would be a European phenomenon. The protected fund would not be the law of any one country. It would actually be a European legal institution. Therefore, it would be properly recognized in every European country. And this is practically and economically important. And it would be one of the arguments for having it in EU law, because it promotes the single market, by having a device that is a European device. So I think it certainly has some attractions.

**Watanabe:** I think I understood your view on each approach. But I would like to ask you some more questions. Do you agree with the Italian approach? Of course, it’s controversial. To me, it’s a surprising solution.

**Reid:** Yes. I think it is. Maurizio Lupoi who particularly promotes it, is, of course, himself a very distinguished lawyer and a very distinguished trust lawyer. And he is very knowledgeable and very keen on the trust. He is personally very enthusiastic.

**Watanabe:** The Italian approach is very surprising for me. It’s not impossible to make such an interpretation of the articles of the Hague Trust Convention. Anyway, actually, under such an assumption, many substantial internal trust have been set up in Italy. But, for example, Professor Lupoi has been very much against introducing trusts in Italy by legislation.

**Reid:** Has he? I don’t know. I haven’t talked to him about it.

That’s interesting. I do find it a little bit odd, because if you want to have the trust in your own system, you are probably better off having it as a proper part of your law, rather than by using the law of a different country. I think that’s problematic. It’s an odd way to go about it, as far as I can see.

**Watanabe:** I think it is also possible for Italy to introduce trusts by legislation, like Japan or China.

**Reid:** Yes.

**Watanabe:** It is possible to enjoy almost the full effect of trusts in civil law jurisdictions. But in Japan there is still no answer on the essence of beneficiary rights. The ultimate answer is that the effect of the beneficiary rights is made by a special law: trust law.

So, little problem, but no definite answer. Professor Lionel Smith of McGill University (Quebec, Canada) said to me when we exchanged e-mails, “There seems to be no answer for the essence of beneficiary rights in Japan.”

But introducing the effects of the trust itself is possible in civil-law countries, I think.

**Reid:** Yes, certainly. I think that must be right. But you can achieve trust-like effects without having trusts
at all. You can have contracts in favor of third parties. They have some of the effects of trusts. So you can just do it by contract law. You don’t need to have the institution of a trust.

For most civil-law countries the idea of having the trust as an institution is quite difficult, because private law in these countries is so settled and has been settled for hundreds of years, in some cases. So the idea of introducing a wholly different vehicle is quite difficult, even if it could be done safely. I think there may not be much appetite for doing something as radical as that.

So I’m not expecting that in the next 20 years we’ll suddenly have a lot of trust law in Europe. I don’t think we will.

What we may get is more people willing to sign the Hague Convention, because there are a lot of Europe countries that are not signatories to the Hague Convention. And I think the number is growing and will continue to grow. France, Switzerland, Italy, the Netherlands, and Luxembourg have now signed it. The number of countries has been increasing, though slowly, because people no longer regard the trust as so puzzling that they don’t want to have any part of it.

So I think the Hague Convention will benefit. But I’m not sure that there will be anything else.

Watanabe: I think French fiducie is still a rather limited institution, although some reform has been made recently.

Reid: Right. It is limited. I think it’s not surprising that it’s limited. In a way it’s surprising that they did it at all in France. They took a long time. They had draft legislation around for many years.

Watanabe: And it failed for tax-related reasons. The first draft was rejected.

Reid: Yes.

Watanabe: I don’t know why some countries are so concerned with the tax issue.

Reid: The tax issue is also important. There are two things. One is that there is a practical question of “If you have trusts or something like a trust, what tax regime are you going to apply?” Because if it is a separate fund, then it probably has to have separate taxation. So that’s one issue.

But also, at least in the United Kingdom, trusts are used very much as a means of tax avoidance, because trusts are good ways of making money disappear. And naturally, tax authorities are not very keen on promoting ideas to make money disappear. They want money not to disappear.

So I think the tax issue is not unimportant. I think, realistically, if you are going to introduce a trust you have to think about the tax aspects of it, too. I think that’s always going to be an important consideration.

Watanabe: Getting back to the Draft Directive on Protected Funds, what are the major differences between it and the Principles of European Trust Law?

Reid: There is a difference in scope, because protected funds only apply in a commercial context. So that’s an obvious difference. But beyond that, I don’t think there is much conceptual difference. I think there is a practical difference, in that the Protected Fund Directive is much more worked out. The Principles of European Trust Law are very short. And they were just designed to give a very general idea of how trusts work, whereas the Protected Fund Directive is intended as legislation. So it’s much more detailed, although it’s not nearly as detailed as the DCFR. I was very surprised when I looked at Book X of the Draft Common Frame of Reference, because it goes on page after page after page. It’s very detailed, indeed.

Watanabe: At the concrete level, in each article, what was the major change between them?
Reid: I don’t think there is a major change. I think the change is one of detail. There are some articles that look very similar.

I think there is probably a difference in the amount of attention that went into the drafting. The Principles of European Trust is very short. It was produced quickly. I was only at the last meeting, but I think there were only three meetings or so. So it was done very quickly.

But the Protected Fund Directive took much longer to produce. There was a lot of discussion. A lot of care was taken with it. It went through many drafts, probably 20 different versions or so before we got what we wanted.

So there was a lot of work that went into that. I did a lot of the drafting myself. And I spent a lot of time on it.

Watanabe: Before today’s meeting with you, I looked this draft on protected funds through again. It’s well-drafted, I think. Is there anything you heard about adopting these protected funds?

Reid: I don’t know. I have no information on this at all. I have no idea whether Brussels will be interested in implementing it.

Watanabe: If this Protected Fund Directive is implemented in Scotland, what will happen?

Reid: That’s actually one of the interesting things, because for countries that don’t have the trust, you simply introduce the protected fund. For countries that do have the trust, you have a choice. Either you say, “We will carry on having our own trust and also have the protected fund,” so people then would have a choice in certain situations as to which to use, or you adjust your law of trusts to make it comply with protected funds.

My sense of this would be that countries that already have the trust, like Scotland and England, would simply introduce protected funds as an additional device. And they would do so in cases that had a European element, to ensure mutual recognition. I think the attraction in Britain of protected funds would be mutual recognition by other countries. Otherwise, there is nothing in the protected fund that could not be done under U.K. law anyway.

Some of the rules are technically neater than what we currently have either in Scotland or in England – some of the rules about liability of trustees for contracts, the ability of the counterparty in a contract to go straight against the trust patrimony.

So there are some technical aspects of it that are actually better than the current law, either in Scotland or in England.

And it’s conceptually a bit stronger than either Scottish or English law, which are both based on case law and grew up in the usual sort of common-law way, which is rather chaotic, whereas this is quite a carefully thought-through thing.

But I can’t imagine there being any strong opposition to it in the United Kingdom. It would be quite easy for Scotland, England, and Ireland to take the protected fund. I think the controversy will come from other countries, those that don’t want to have something that looks like a trust.

Watanabe: You mentioned the word “patrimony”. I think two different notions of patrimony can exist. One is a substantial legal entity. The other is segregation of the asset. Which do you think is better to explain the effect of trusts?

Reid: Do you mean patrimony as opposed to segregation? Is that your question?

Watanabe: I think one is like a juristic person. Another is just a special estate, segregated special estate.
Of course, it is a very good for explanation if you take trust assets as a juristic person. But, as you know well, we don’t assume trust asset as a juristic person.

And as far as I know, other than Delaware in America, no jurisdiction has admitted trust assets as a juristic person.

Reid: The Scottish Law Commission, which has been working on trusts, considered the question, which I think they were right to do, and they decided there wasn’t really any advantage in having a separate legal person, that it would just make life more complicated.

One of the essences of trusts is informality. And if you create a separate legal person, you immediately have the complexity of what the rules are about disclosure, about its name, about accounts, etc. The more formalities you have, the harder it is to maintain an institution that is essentially private.

So if you want to have a juristic person, form a company. What is the point in having a trust as an additional corporate vehicle, when you have got plenty of corporate vehicles already under the existing law of companies or limited partnerships, or whatever? I think that’s one argument.

Going back to patrimony, segregation, and so on, the idea of patrimony is, of course, central to the trust. As you point out in your paper, and others have pointed out, patrimony doesn’t explain everything. It’s not a complete answer to the way trusts work. But it does explain a lot. It’s a useful way of accounting for what is otherwise very hard to account for in a civil-law system.

Without the idea of patrimony, it’s very hard to explain why it is that a beneficiary’s right should be protected in bankruptcy, because the beneficiary’s right is simply a personal one. Why should a personal right ordinarily be protected in bankruptcy?

The idea of patrimony neatly solves that, as well as drawing attention to the practical that the trust fund really is separate. This is what a trust is about. It’s about a trustee who is distinguishing between his personal assets and the trust assets. So there is physically a fund that should be kept identifiably separate.

Watanabe: Also, in Japan, as a matter of fact, the most famous and influential trust theory has been a kind of patrimony theory. The late former professor at the University of Tokyo, Kazuo Shinomiya was deeply influenced by Pierre Lepaulle. Prof. Shinomiya’s theory is the most famous and influential in Japan, but contract-based trust theory is very common in Japan. However his patrimony theory explains much more than such a contract-based theory.

Reid: Interesting.

Watanabe: So the difficulty lies in this point.

Reid: I can see that.

Watanabe: So for the Japanese, we still have no definite answer about the essence of beneficial rights in a trust.

Reid: Maybe there is no answer. There may be no single answer, anyway. I think trusts are very complicated.

Watanabe: My questions are finished. Thank you very much for taking up your precious time.

Reid: Thank you very much for coming to see me. And well done. This is a good piece of work.

Watanabe: I’m afraid that there are still some fundamental mistakes in my article.

Reid: I read it carefully, and it struck me as being very accurate indeed.

Watanabe: I very much feel honored to get comments from you.

Reid: I found it useful and interesting, actually. Well done. It’s very hard to do comparative law. And you
actually cover lots of different countries. You cover Scotland, but you also cover Italy, and you look at France, and so on. So you have done a huge amount of work to produce that.

**Watanabe:** My work on the comparative law of trusts is still superficial. However, I really feel it is very interesting. I hope to have a chance to hear your opinion again in the near future. Thank you very much indeed, Professor Reid.

**Endnotes:**

1. Edited by Kortmann, Hayton, Faber, Reid and Biemans, Towards an Directive on Protected Funds (Kluwer Legal Publishers, 2009).